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United States Supreme Court

October Term, 1886.

AMELIA L. HOWARD, TALBOT S. HARRIS, CAROLINE A. OWEN *ET ALS.*, APPELLANTS,

vs.

P. DE CORDOVA, W. R. BOYD, P. E. HILL *ET ALS.*, APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR COMPLAINANTS AND APPELLANTS.

F. C. ZACHARIE,
Solicitor for Complainants and Appellants.

No. 758.

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The sole question presented in this case is that of the jurisdiction of the United States Circuit Court at Dallas to hear and determine this cause; and this question of jurisdiction grows out of the following statement of facts as exhibited by the record.

At the February Term of the District Court of Freestone county, Texas, P. De Cordova filed a suit by his attorney, W. R. Boyd, in that Court against the unknown heirs of J. W. Zacharie, deceased, and another alleging that he was the legal owner in fee simple of an equal undivided one-sixth of certain

lands situated partly in Freestone and partly in Anderson county, Texas. On the 9th day of November, 1895, W. R. Boyd, attorney for the plaintiff in this suit, makes affidavit before the clerk "that the residence of Joseph Smolenski is to him unknown, that the names of the heirs of J. W. Zacharie is to him unknown."

This affidavit was made in order to procure service by publication under the Texas statutes, which is admitted to have been regular in order to acquire jurisdiction in that proceeding, and the statute is not therefore quoted. Publication was made as required by the statute for the requisite length of time, the sheriff made his return of service by publication, and on the 8th of September, 1896, R. L. Williford, Esq., an attorney at law, was appointed by the District Court of Freestone county, Texas, to represent "the defendants, Joseph Smolenski and the said unknown heirs of J. W. Zacharie." This appointment was made by virtue of a Texas statute, and the appointment is conceded to be regular and that the law required it to be made. The case was tried by the Court upon an agreed statement, signed by W. R. Boyd, plaintiff's attorney in this suit, and R. L. Williford, the attorney appointed by the Court to represent the unknown heirs of J. W. Zacharie and Joseph Smolenski, which statement was approved by the Court. This proceeding is regular and in accordance with the Texas statutes which is therefore not quoted. Judgment was rendered for the plaintiff, and commissioners appointed who at the September Term of the Court made the report of the partition made by them, and this report is confirmed by the Court at the September Term of the said District Court.

This proceeding is admitted to be regular and in conformity with the Texas statute, which is not therefore quoted. The

original bill and the amendment thereto implicitly, if not expressly, admits the regularity of all the proceedings culminating in a final judgment in the District Court of Freestone county, Texas. Under the Revised Statutes of Texas, which took effect on the 29th of April, 1895, and in force at the date of the judgment of the District Court are found these provisions:

1st. Art. 1375. In cases in which judgment has been rendered on service of process by publication, when the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the Court upon the application of the defendant for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment.

Art. 1376. In the cases mentioned in the preceding article a petition shall be filed and service of process made upon the parties adversely interested in the judgment as in other cases.

Art. 1377. In the cases mentioned in the two preceding articles, process on such judgment shall not be suspended, unless the defendant or party applying therefor, shall give bond, with two or more good and sufficient sureties, to be approved by the clerk in double the amount of the judgment, or value of the property adjudged, payable to the plaintiff in the judgment, conditioned that the party will prosecute his petition for new trial to effect and will perform such judgment as may be rendered by the Court should its decision be against him.

Art. 1378. When in such cases as is mentioned in the three preceding articles, property has been sold under the judgment and execution before the process was suspended, should he defeat plaintiff's action, shall not recover the property so sold but shall have judgment against the plaintiff in the judgment for the proceeds of such sale."

On the 7th of July, 1898, not less than two years after the date of the final judgment in the District Court of Freestone county, Texas, the complainants, who are the only heirs of J. W. Zacharie, deceased, filed their original bill in this cause, No. 487, in Equity, in the United States Circuit Court, at Dallas, against P. De Cordova, W. R. Boyd, Joseph Smolenski, and F. E. Hill, Charles Robertson, J. M. Parker, and George W. McAdams, the four last respondents being purchasers of a portion of the land adjudged to plaintiff in the Freestone county judgment or a part of the land conveyed by P. De Cordova to W. R Boyd. An amended bill was filed by complainants on January 10th, 1899. The case made by the original bill and the amendment is one of fraud on the part of P. De Cordova and his attorney, W. R. Boyd, in the procurement of the judgment in the District Court of Freestone county, Texas. The frauds alleged in the bill and its amendment were not issues in the suit in Freestone county, but consisted of facts arising in the service of the citation by publication, in the trial of that cause in imposing upon and deceiving the judge who tried that cause as to the facts, and finally fraud in the report of the commissioners, upon which the final judgment was based, or rather fraud in the suppression of facts known to P. De Cordova, which had they been known to the commissioners or the Court would have resulted in a different judgment from that rendered. Those various steps taken by P. De Cordova and his attorney are set forth with great particularity in the original bill and its amendments, which may be condensed and summarized as follows: That the affidavit for service by citation, annexed to P. De Cordova's original petition, was made by his attorney, W. R. Boyd; that on May 16th, 1892, W. R. Boyd had corresponded with one of the complainants,

J. S. Zacharie, at New Orleans, in regard to the Zacharie lands; that at the time of making said affidavit both P. De Cordova and W. R. Boyd knew the names and places of residence of the heirs of J. W. Zacharie, deceased, who are complainants herein; that the citation for publication was published in the Northern Vindicator, in a remote part of the county of Freestone from the county site and remote from the lands, probably 35 or 40 miles; that such publication was calculated to withhold information of the pendency of the suits from complainants and their agent who resided near said lands, and did have this effect; that complainants knew nothing of said suit during its pendency and not till long after final judgment was rendered therein—that P. De Cordova, by his attorney W. R. Boyd, alleged in his original petition "that he, P. De Cordova, is the legal owner in fee simple and of an equal undivided one-sixth interest in the hereinafter described land, and is entitled to partition and division of same;" that this allegation was false, as shown by Exhibit F. which was a contract by J. W. Zacharie with P. De Cordova and J. De Cordova for certain services to be rendered by them in having the grant placed on the map, and in making compromises and sales with settlers on the grant, to make a full title for one-third of all the lands which shall be secured with a clear title by compromise or survey and to allow the said De Cordovas one-third of all receipts made by sale of said lands by way of compromise." which instrument was relied on as shown by the agreed statement of facts in the Freestone District Court to establish the fact alleged in the petition that P. De Cordova was the owner in fee simple of one-sixth undivided interest in the entire eleven league grant; that this instrument marked Exhibit F. and quoted in part above was the only evidence of P. De Cordova's right or title to any part

of the Rionda grant (of which the land recovered by P. De Cordova in the Freestone county District Court is a part,) that complainants believe and charge the fact to be that said Exhibit F. dated February 26th, 1852, was not read in evidence to the Presiding Judge Rufus Hardy (who tried said cause) and that its contents were not made known to him in any way and that he was deceived and imposed upon as to the contents of said instrument marked Exhibit F. and dated Feb. 26th, 1852, both by the allegations of the petition and the agreed statement of the attorneys found in the record in which the instrument marked F. and dated Feb. 26th, 1852, is stated to be a "deed or transfer from J. W. Zacharie to Jacob De Cordova and Phineas De Cordova, dated Feb. 26th, 1852, recorded in Vol. H, 1, p. 557, deed records of Freestone county, Texas, conveys an undivided one third interest in eleven leagues granted to Manuel Riondo"—that complainants cannot state that said imposition and deception practiced upon the Court was done designedly or fraudulently, but if such was not the character of the deception and imposition, it was done by accident or mistake and is no less a fraud upon complainants rights, because it resulted in an unjust and inequitable judgment, depriving complainants of a considerable part of their property upon untrue and false statements in the original petition in the District Court of Freestone county, and upon untrue and false statements in the agreed statement of facts upon which the case was tried in said District Court, the real facts being withheld from the Judge trying the case; and that he signed and approved said agreed statement relying upon its correctness, because agreed to by the attorneys, when in fact said agreed statement was false in fact, and the Judge was thus deceived; and the complainants charge as another act of fraud that the Exhibit marked G. in the record, which reads as follows:

"According to an account furnished by J. W. Zacharie of New Orleans, it shows that I am largely in his debt, therefore, for and in consideration of the premises and two hundred and fifty dollars cash to me in hand paid, I do hereby relinquish to the said J. W. Zacharie all my rights, titles, interest and claim in and to the Rionda grant of 11 leagues in any shape or form, and hereby declare that the said contract is this day cancelled and annulled. (Signed) J. DE CORDOVA.

"Galveston, May 7th, 1860.

"Filed Sept. 16th, 1865. J. H. GROTH,

"Clerk County Court of A. Co."

Was stated in said agreed statement of facts upon which the case was tried, thus: "5th. J. De Cordova to J. W. Zacharie receipt and relinquishment of all his interest in M. Rionda 11 league grant, dated May 7th, 1860, recorded in Vol. H 1, page 579, records of Freestone county, Texas." Whereas, in truth and fact of J. De Cordova and P. De Cordova being joint covenantes in the executory contract of Feb. 26th, 1852, styled Exhibit F, that said release and relinquishment of J. De Cordova operated as a release or relinquishment by both the De Cordovas to J. W. Zacharie, and neither of them had any right or interest therein thereafter, and that the character of this instrument of May 7th, 1860, was withheld from the presiding Judge under said agreed statement, and he was deceived thereby; and they further charge as a stop and as use of the several fraudulent acts of P. De Cordova, the plaintiff in the suit in Freestone county withheld from the Court information in his possession to the effect that J. W. Zacharie had in his life time made a full and complete settlement in May, 1860, with the said J. De Cordova and P. De Cordova, paying them in full under the contract of Feb. 26th, 1852, their one-

third in full, as shown by the itemized account set out in Exhibit E, and also by the instrument dated May 7th, 1860; and the Court or Judge, misled and deceived by the suppression of this fact by plaintiff, made his preliminary decree according to the allegations of the petition and the aforesaid false agreed statement of facts, and the commissioners appointed by the Court charged J. W. Zacharie with all the sales made of the land in his life time, and that plaintiff, P. De Cordova, was not charged for any of said sales, although he and J. De Cordova had been paid therefor in full. In the original bill it is alleged that the amount of land in the Rionda grant sold by J. W. Zacharie or his agents, J. and P. De Cordova, was about 10,000 acres, exclusive of the sale by J. W. Zacharie to Joseph L. Smolenski; that the commissioners fell into this error by the fraudulent suppression, as aforesaid, by P. De Cordova of the facts above stated, and your complainants have in this way been divested of a part of their land and property; and it is further stated in both the original and amended bills that all of the proceedings and steps taken in the procurement of the judgment in the suit of P. De Cordova in Freestone Co. against complainants were the result of a conspiracy and combination between P. De Cordova and his attorney, W. R. Boyd, to obtain an unjust and inequitable judgment against your complainants and that they succeeded. The complainants further charge that P. De Cordova had no interest or title, in fact, in the Rionda grant to any part thereof; that the contract of February 26th, 1852, was barred by limitation under the statutes of Texas in an action for specific performance, the only right of action he had; that in the suit in Freestone Co., Texas, 7326 acres were set apart to P. De Cordova; that under no state of facts could he be entitled to more than 4784 acres,

if he held an absolute deed to one-sixth undivided interest, as alleged by him in his petition in said Rionda grant; and they charge that in the partition made, the only land upon which complainants had improvements in the way of farms and houses was set apart to P. De Cordova and being the most valuable part of complainants' land, and unimproved land of comparatively little value was set apart to complainants; that J. W. Zacharie died June 1st, 1870, and complainants are his only heirs. The land in controversy is of the value of $21,100. The complainants are citizens of Louisiana; the defendants are citizens of Texas, except Smolenski, whose residence is unknown. The original bill shows that complainants knew nothing of the pendency of the suit in the State Court and heard nothing of said suit and the judgment therein until long after the rendition thereof, they being cited by publication.

This embraces a synopsis of the facts charged in the original bill and its amendment, setting forth the facts alleged to be fraudulent. Record, pp.

The bill was dismissed for want of jurisdiction of the matter in controversy. The complainants excepted in open Court and the exception was allowed. Record, p. . The complainants prayed that an appeal be allowed and the question of jurisdiction of the Circuit Court may be certified to the Supreme Court and upon this petition the following order was made, that the appeal be granted to complainants and bond therefor fixed at $500, which is approved by the Court; that the appeal is granted solely upon the question of jurisdiction of the Circuit Court of the subject matter in controversy, which is certified to the Supreme Court of the United States, and the appeal is allowed in open Court at the term at which the judgment is rendered. Record, p. .

Argument.

As is disclosed by the above statement, the sole question in this case is whether the United States Circuit Court had jurisdiction of the subject matter in controversy. This question is raised by the demurrers of the respondents found in the record, p. . For the purpose of this argument, the demurrers admit the truth of the allegations of the bill and its amendment. The diverse citizenship of the complainants and the respondents, the amount or value of the lands in controversy at $21,100, the frauds practiced by P. De Cordova and his attorney are all admitted, and the sufficiency of the allegations of fraud in the procurement of the judgment in the State Court was not challenged, nor the truth thereof questioned, and the sole ground of the judgment of the Court dismissing the bill was based upon the proposition that an adequate remedy existed in the State Court under Arts. 1375 to 1378, inclusive, quoted above from our State Statutes, and provided a remedy which the complainants, who are non-residents of the State, and cited by publication, are bound to pursue.

Our first assignment of error is this: "The bill shows that this Court had jurisdiction of the subject matter in controversy." Record, p. . This assignment challenges the correctness of the judgment of the Court and embraces substantially the other assignments, and clearly presents the issue of law involved.

It is admitted, and the date of the filing of the original bill shows, that the complainants discovered the existence of the judgment rendered in the State Court before the expiration of two years from the date of that judgment, but not until long after its rendition. The question, then, reduced to its narrowest compass, is this: Is the remedy given to non-resident de-

fendants cited by publication by the Texas Statutes quoted above, exclusive of Federal jurisdiction, in a case in which the facts, such as diverse citizenship, amount involved and fraud in the procurement of a judgment exist and sufficient in themselves to give jurisdiction to the Federal Court? Is the bill of review given by the Texas Statutes exclusive of the jurisdiction of the Federal Courts in a new suit, founded upon new facts, arising in the course of a trial of which the defendants know nothing and which were not in issue in the original suit? The office of a bill of review under Art. 1375, Revised Statutes, is to procure a new trial. It is in addition to the remedy by appeal or writs of error. See Chrisman vs. Miller, 15th Tex., p. 159.

We are aware of the well established doctrine that this U. S. Circuit Court cannot act as a Court of Appeals to control the judgment of State a Court; nor will it act in a case where the bill shows that it is a continuation in effect of the original suit in the State Court, for the purpose of correcting errors or irregularities in the judgment of the State Court. The judgment rendered in the State Court in Freestone county is a final judgment, and not the less a final judgment, because the Texas Statute authorizes a bill of review within two years for the purpose of procuring a new trial. The statute leaves it entirely optional with our service by publication to making his application for a new trial within two years from the date of the judgment, and it would be a singular statute if it did not, but the effect of the statute is that if such application is not so made, the defendant cannot avail himself of the right afterwards. This Art. 1375 can have no effect whatever upon the right of non-residents, since by publication to file an original bill on the equity side of the docket in the Federal Courts, at-

tacking the judgment in the State Court for fraud in the procurement of the judgment upon a new state of facts not in controversy in the State Court. If the reverse of this proposition were true, then a State by its legislation might impair the jurisdiction of the Federal Courts and abridge the right of a citizen of another State to the equal protection of the laws of the United States.

It is said in the case of Smyth vs. Ames, 169 U. S., Par. 16, "that the adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court is not to be exclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to such in the Federal Circuit Court may invoke its jurisdiction in equity wherever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State Court in the same cause of action." This was said by this Honorable Court in response to the argument that the 5th Section of the Nebraska Statutes, authorizing railroads in certain cases to institute suit in the Supreme Court of the State, had in effect excluded the jurisdiction of the Federal Courts in the cases mentioned. The Legislature of Nebraska in this 5th Section had sought to make the jurisdiction of the State Supreme Court *mandatorily* exclusive of the Federal Courts, but it was to no purpose; this Court sustained the jurisdiction of the latter Courts in the cases and instances in which the State had correctly sought to exclude it.

Again, the attempt of the Legislature of Texas in organizing a Railroad Commission under the Constitution of Texas, amended for the purpose enlarging the power of the Legisla-

ture on that subject, to exclude the jurisdiction of the Federal Courts, met with a similar fate in the case of Reagan vs. Farmers' Loan and Trust Co., 154 U. S. 362, 391, in which it was said "Whenever a citizen of a State can go into the Courts of a State to defend his property against the illegal acts of its officers, a citation of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own Courts." See other cases referred to in this opinion by Justice Harlan.

In affect this Honorable Court decides that the jurisdiction of the Federal Courts and the State Courts in the cases mentioned in the Nebraska and Texas statutes is concurrent in both Courts, although these States in as strong terms as possible had sought to confine the jurisdiction to the State Courts, and that under the benign operation of the Constitution of the United States and the legislation thereunder, the non-resident has the choice of forums in which to vindicate his rights. In the case at bar, a different question is presented—this jurisdiction to pass upon a bill of review for the purpose of procuring a new trial is exclusively within the jurisdiction of the State Court and necessarily so, but because this is true, does it follow that no remedy exists in the Federal Courts to try and determine a new case upon a new state of facts not in controversy in the State Court, although growing out of facts transpiring in the course of the trial in the State Court and incidental to it?

Is the non-resident by force of State legislation be driven to pursue the remedy given by the State statute, and excluded from the Federal Courts in a new and different case, because he files his suit in the Federal Court within the period limited

for making his application in the State Court for new trial?

This seems to us to be a perversion both of the meaning of the State statute, and of the National legislation conferring jurisdiction in given cases upon the Circuit Courts of the United States, as well as a departure from the rules laid down in many cases decided by this Court.

The case more nearly in point upon this subject decided by this Honorable Court that we find is the case of Barrow vs. Hunton, 99 U. S. p. 8. The Louisiana code allowed an action of nullity to be brought in the the State Court where the original cause was tried to set aside a judgment for several causes, one of which was "when the defendant is condemned by default without being cited." Hunton had recovered a judgment in the State Court against Goodrich and another, Goodrich filed a petition in the Court in which the judgment was recovered praying for an injunction and basing his application for relief upon the ground that no lawful service of the petition and citation in the suit had ever been made on him and for other causes set forth. Hunton removed the case to the Circuit Court of the United States, alleging he was a citizen of the State of Missouri. A motion to remand to the State Court was made and overruled, and the Circuit Court of the United States made a final decree dismissing the bill, etc. The action of the Circuit Court was reversed upon the ground that causes of nullity relating to form, of which Hunton's was one, could not be brought in the U. S Circuit Courts or removed thereto. He questioned the regularity of the judgment because there was no lawful service of the petition and citation upon him, which was held to relate to form and regularity of the proceedings of the State Court. Justice Bradley in his opinion says: "It shows that in the estimation of the Legislature of

Louisiana (discussing the various articles of the Louisiana code) there is a manifest propriety in submitting the question of the validity to the Court which rendered it, or to the Court which has the right to revise the judgment by way of appeal. We are not disposed to allow this consideration to operate so far as to make it an invariable criterion of the want of jurisdiction in the Courts of the United States. If the State Legislatures could, by investing certain Courts with exclusive jurisdiction over certain subjects, (as in the Nebraska and Texas cases *supra*), deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of the citizen to resort to those Courts. The character of the cases is always open to examination for the purpose of determining whether, *ratione materiæ*, the Courts of the United States are incompetent to take jurisdiction thereof." The reasoning of the Court strongly leads to the inference that had the nullity of the State judgment arisen out of the fact that it had been obtained through fraud, bribery, etc., relating to the merits, that it might have presented a case which could have been removed to the Federal Court, although the Louisiana code in its 607th Article made such facts grounds for the proceeding of nullity in the State Court. But be that as it may, Goodrich or Barrow's case presented only facts challenging the regularity of the proceedings in the State Court, while the case we present makes no question of this sort, and is in no sense an effort to set aside the State judgment for irregularity or errors but assails it for fraud in its procurement, in the conduct of the cause from its inception to its end, in impositions practised upon the State Judge and in the falsity of agreed statements upon which the judgment was based.

The case we make falls within the principles announced in

Gaines vs. Fuentes, 92nd U. S., p. 10; Johnson vs. Waters, 111 U. S., p. 640, 667, and Arrowsmith vs. Gleason, 129 U. S. p. 86-101, to which we will refer more fully hereafter. In the argument below the case of Nougui vs. Clapp, 101 U. S., p. 551, was much relied upon by the respondents for the purpose of showing a want of jurisdiction in the United States Circuit Court. This also was a Louisiana case. Justice Miller says: "Complainant in this bill entered his appearance in that suit (in the State court) at a proper stage of it to enable him to contest the right of Clapp to have the property sold. The usual mode in the courts of Louisiana of contesting the right to foreclose a mortgage is by obtaining an injunction, after which the rights of the parties are judicially determined by the court, complainants appeared and obtained an order for such an injunction. If this order was not obeyed, it was for that Court and not this to give remedy." The complainant stated in his bill that he had obtained an order from the Court for an injunction, but the clerk refused to issue it, and this refusal of the clerk was a part of the fraudulent conspiracy to cheat him. It is manifest from reading the facts in this case that by some appropriate proceeding in the State Court in a case in which he had appeared, he should have caused the order of the Court to be obeyed, and had the mandate of the Court enforced. This case is distinguished from Marshall vs. Holmes and Johnson vs. Waters and Arrowsmith vs. Gleason, and kindred cases in the first of these cases mentioned above. Nougui having entered his appearance in the case, was charged with notice of what was happening in his presence, and if there was fraud, or a fraudulent combination to cheat him, he must have perceived it when the clerk refused to issue the injunction, and from all that appears from the allegations of his

bill, this fraud must have been known to him before the final decree in the State Court, and he acquiesces in the judgment until he filed his suit in the United States Circuit Court. Clearly a case with such facts cannot constitute a precedent for the case made by the complainants in their bill. The case of Arndt vs. Griggs, 134 U. S., p. 316, was much relied upon in argument to show that Texas had the right to enact legislation that could enable the citizen to have titles within its limits to real estate adjudicated as against non-residents who are brought into Court by publication.

This right our bill in no way questions, nor do we question it, and we repeat what we have before stated that not only has Texas enacted such legislation, but that the provisions of the Texas statute upon that subject were scrupulously pursued in the Freestone county proceeding, resulting in a judgment against complainants which is perfectly valid to all intents and purposes, unless it is vitiated by the frauds committed in its procurement, which are stated at length in the original bill and its amendment.

The case of Johnson vs. Waters, 111 U. S., p. 640, seems to us more in point than any of the cases we have referred to. These facts are stated at considerable length in the opinion of the Court, and we will not attempt to state them further than to invite attention to some of the artifices resorted to in applications for orders of sale to the parish Court. Buckner, as natural tutor of his minor child, Mollie Buckner, and other creditors, filed his petition in the parish Court asking for an order of sale, and representing that he, as tutor of his minor child, is a creditor by a judgment of the District Court in said parish. The executor of Oliver J. Morgan, deceased, intervened in this application and joined Buckner in the prayer for an order to sell,

upon the ground that the estate was indebted to the creditors mentioned in Buckner's petition and various others, and there were no funds on hand to pay these claims.

The order was granted by the Parish Judge. Before the day of sale arrived, one of the attorneys, who had signed the application for an order of sale as attorney for the executor, filed another application for the sale of the interest of Julia Morgan in the lands of Oliver J. Morgan, which the petition declares that she claimed to be a three-fourths undivided interest, which was alleged to be incumbered by a mortgage to secure the heirs of Oliver H. Kellom, and the petition prays that the proceeds of such sale may be paid by preference to the settlement thereof. This petition was duly considered by the Parish Judge and the order was made.

Justice Bradley, in the opinion, says: "The claim, therefore, that the debt due from Oliver J. Morgan and his succession to Oliver H. Kellom, Jr. (if any such debt existed) was a first lien upon the lands of the succession, secured by mortgage, and entitled to be first paid, was entirely unfounded." He further says that this pretended debt, secured by mortgage, was artfully used in all these proceedings to produce the impression that the estate would be absorbed by these preferred claims. He further says that the entire interest of Julia Morgan in her father's property was subject, at his death, to all his debts. Claims were put forward in these applications that were unfounded and untrue, and the Parish Judge was either deceived by them, or must have believed that if he knew of the unfounded character of the claims urged in these petitions that the proceeds of sales could be afterwards properly distributed according to the legal rights of the creditors. An order to sell the lands to pay the creditors should have been granted, per-

haps, regardless of the claims that were asserted in the petitions, but on the decree made on the last petition, it is ordered "that the undivided interest of Mrs. Julia Morgan, deceased, in said land (claimed to be three-fourths) be sold at public sale, in order to pay said debt," of whose existence Justice Bradley was skeptical. Under such an order her interest could only have been sold to pay this debt.

The Parish Judge in making the decree or order of sale was manifestly imposed upon by the representations made in these applications, or we must conclude that he was in the conspiracy to defraud the creditors of Oliver J. Morgan, a conclusion not warranted by the facts. It is true that the combination was carried on afterwards up to the time of the sale to deter bidders from bidding on the lands that were sold by virtue of the judicial orders, and that in effect the heirs of Oliver J. Morgan remained in possession of the lands of the estate to the detriment of the creditors, who were practically frozen out. We quote again from the opinion: "The next question is, whether the complainant is in a situation to contest the validity of the sale by the present suit. It is contended that he is concluded by the proceedings in the Probate Court of Carroll parish, which is alleged to have had exclusive jurisdiction of the subject matter, and its decision is alleged to be conclusive against all the world, but especially against the complainant, who was a party to the proceedings. The administration of Gen. Morgan's succession undoubtedly properly belonged to the Probate Court of the parish of Carroll, and, in a general sense, it is true that the decisions of that Court in the matter of the succession are conclusive and binding, especially upon those who were parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the

parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a Court of equity relief against fraud. It is generally parties that are the victims of fraud. The Court of Chancery is always open to hear complaints against it, whether committed in pais or by reason of judicial proceedings. In such cases the Court does not act as a Court of review, nor does it inquire into any irregularities or errors of proceeding in another Court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage they have derived under it." Judge Bradley then quotes from Barrow vs. Hunton, 99 U. S., p. 80, to the effect that, "if the proceedings (in the U. S. Circuit Court) are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding. * * * A new case arising upon new facts, although having relation to the validity of an actual judgment or decree, etc." We refer also to the case of Jackson vs. Ludeling, 21 Wallace, p. 616, in this connection. The demurrer to the complainants' bill and amendment admit for the purposes of this case the truth of the allegations of fraud in the procurement of the judgment in Freestone county, and the sufficiency of the fraud to set aside the judgment, but the contention is that the State Court having acquired jurisdiction of the subject matter, its judgment is conclusive; and the complainants are without remedy, no matter what fraud prevailed in the procurement of the judgment, except in the manner and form pointed out by the State statute. In other words, as we understand the argument, it is that the State statute having prescribed a remedy, no other can be pursued in any other forum, although the facts exist which give

that other forum jurisdiction of a case growing out of facts occurring in the trial in the State Court, but which were in no sense in controversy in the latter Court. The argument limits the well understood rule that non-residents cannot be deprived of their choice of forums to those cases only which have not for their object the setting aside and annulling of judgments for fraud in their procurement; and when this is sought to be done, they are compelled to adopt those modes of procedure prescribed by the State, and in the forum where the judgment is obtained. This confounds all distinction between a bill of review and an original proceeding upon new facts not before in controversy. We think the cases to which we have referred heretofore show the fallacy of any such opinion. In conclusion, we observe that it is one of the characteristics of fraud in its movements to comply with the forms prescribed by law, and to conceal its purpose under the regularity of its proceedings—it assumes all colors, like Iris, when sent on a mission from Olympus:

> **"Downward the wondrous goddess took her flight,**
> **And drew a thousand colors from the light."**

It is Protean in shape—it is sometimes bold and defiant; at other times timorous and cringing, but at all times artful; but whatever may be its mien, it is the office of a Court of Equity to expose its operations and nullify their results. Judicial proceedings cannot sanctify a fraud; they only make more difficult the investigation set on foot to discover its existence. Happily in the present instance the trail of the serpent is found in the record of the Freestone county case. In the decision of this cause, we invoke that spirit of equity that gives to each and every man his own.

Respectfully submitted,

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Solicitor for Complainants and Appellants.